At an IAS Term, Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of December 2024.

P R E S E N T:

HON. GENINE D. EDWARDS,
Justice.

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FRANK PEPITONE, Individually and as Administrator of the Estate of JENNIFER PEPITONE,

Plaintiffs,

-against-

MICHELE BALTUS, M.D., ROHAN S. MANKIKAR, M.D., ALEISHA JEFFERS, R.N., POLINA KHANINA, M.D., HUNTINGTON MEDICAL GROUP, REVIVAL HOME HEALTH CARE, PARK AVENUE EXTENDED CARE FACILITY, and MULTIVIZ HEALTH SERVICES,

Defendants.

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DECISION AND ORDER

Index No. 504511/22

Mot. Seq. Nos. 5, 4, 3, and 6

The following e-filed papers read herein: NYSCEF Doc Nos.:

Notice of Motion, Affirmations, and Exhibits.....	67-88; 89-111; 112-130; 131-151
Affirmations (Affidavits) in Opposition, and Exhibits.....	158-162; 163-166; 167-170; 175-177; 178-181[1]
Reply Affirmations and Exhibits.....	171-174; 182, 184;[2] 195;[3] 196

[1] The Court did not consider plaintiff's counsel's letter submissions, dated July 18, 2024 (NYSCEF Doc Nos. 186-187, 188-189, 190-191, and 192-193), each enclosing a copy of the First Judicial Department's opinion in *Holder v. Jacob*, 231 A.D.3d 78, 216 N.Y.S.3d 134 (1st Dept., July 18, 2024). As a threshold matter, the First Judicial Department's opinion in *Holder* is not binding on this Court because of the extant decisions/orders by the Second Judicial Department in this area of law. *See e.g. Damon v Clove Lakes Healthcare & Rehabilitation Ctr., Inc.*, 228 A.D.3d 618, 213 N.Y.S.3d 133 (2d Dept., June 5, 2024); *see also Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 476 N.Y.S.2d 918 (2d Dept. 1984). More fundamentally, the *Holder* opinion is irrelevant because it applied (as set forth in footnote 1 thereof) the original definition of the term "health care services," as set forth in Public Health Law former § 3081 (5), which was in effect from March 7, 2020 through August 2, 2020. *See* L 2020, ch 56, § 1. Here, however, the amended definition of the term "health care services," as set forth in amended Public Health Law former § 3081 (5), which was in effect from August 3, 2020 through April 5, 2021 and repealed effective August 6, 2021, applied to the facts of this case. *See* L 2020, ch 134, § 1; L 2021, ch 96, § 1.

[2] Further, the Court did not consider: (1) the Supplemental Expert Affirmation of Mark S. Silberman, M.D. ("Dr. Silberman"), dated July 15, 2024 (NYSCEF Doc No. 183) ("Dr. Silberman's supplemental affirmation"), which was concurrently filed with the Huntington defendants' Supplemental Attorney Affirmation in Support of Motion for Summary Judgment, dated July 18, 2024 (NYSCEF Doc No. 182) (the "Huntington defendants' counsel's supplemental affirmation"), and (2) Dr. Silberman's Expert Reply Affirmation, dated July 17, 2024 (NYSCEF Doc No. 185) ("Dr. Silberman's reply affirmation"), which was concurrently filed with the Huntington defendants' Attorney Reply Affirmation in Support of Motion for Summary Judgment, dated July 18, 2024 (NYSCEF Doc No. 184) (the "Huntington defendants' counsel's reply affirmation"). *See Alvarellos v. Tassinari*, 222 A.D.3d 815, 201 N.Y.S.3d 489 (2d Dept. 2023); *Pena v. Geisinger Community Med. Ctr.*, 209 A.D.3d 663, 174 N.Y.S.3d 873 (2d Dept. 2022). Likewise, the Court did not consider any of the

(footnote continued)

In this action to recover damages for (among other things) medical malpractice and wrongful death, four motions for summary judgment by the following defendants or groups of defendants were consolidated for disposition:

In Seq. No. 5, defendant Park Avenue Extended Care Facility ("Park Avenue");

In Seq. No. 4, defendants Polina Khanina, M.D. ("Dr. Khanina"), and Multiviz Medical Services, P.C. (sued herein as Multiviz Health Services) ("MMS");

In Seq. No. 3, defendants Aleisha Jeffers, R.N. ("Nurse Jeffers"), and Gamzel NY, Inc., doing business as Revival Home Health Care (sued herein as Revival Home Health Care) ("Revival" and, collectively with Nurse Jeffers, the "Revival defendants"); and

In Seq. No. 6, defendants Michelle Baltus, M.D. ("Dr. Baltus"), Rohan S. Mankikar, M.D. ("Dr. Mankikar"), and NYU Huntington Medical Group (sued herein as Huntington Medical Group) ("Huntington Medical Group" and collectively with Dr. Baltus and Dr. Mankikar, the "Huntington defendants").

Frank Pepitone, individually and as the administrator of the Estate of his late wife Jennifer Pepitone (collectively, "plaintiff"), failed to address or specifically oppose: (1) the branches of defendants' motions which were for summary judgment dismissing the second cause of action alleging lack of informed consent; (2) the additional branch of defendant Park Avenue's motion which was for summary judgment dismissing the third cause of action alleging violations of the Public Health Law; and (3) the branches of defendants' respective

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references to Dr. Silberman's supplemental and reply affirmations in the Huntington defendants' counsel's supplemental and reply affirmations, respectively.

[3] Further, the Court disregarded as belated and redundant the Revival defendants' counsel's Supplemental Attorney Affirmation in Support, dated July 18, 2024 (NYSCEF Doc No. 194), which was concurrently filed with their defense counsel's Reply Affirmation in Support, dated July 19, 2024 (NYSCEF Doc No. 195).

motions striking his demand for punitive damages in the "Wherefore" clause of his complaint.[4] *See Clarke v. New York City Health & Hosps.*, 210 A.D.3d 631, 177 N.Y.S.3d 681 (2d Dept. 2022); *Elstein v. Hammer*, 192 A.D.3d 1075, 145 N.Y.S.3d 572 (2d Dept. 2021); *see also Woehrle v. Buono*, ___ A.D.3d ___, ___ N.Y.S.3d ___, 2024 N.Y. Slip Op. 05815 (2d Dept. 2024) ("Punitive damages are recoverable in a medical malpractice action only where [unlike the instance here] the defendant's conduct evinces a high degree of moral culpability or willful or wanton negligence or recklessness.") (internal quotation marks omitted).

The remainder of this Decision and Order addresses plaintiff's claims for recovery of compensatory damages under the theories of medical malpractice, negligence, wrongful death, and loss of services (the first, fourth, fifth, and sixth causes of action, respectively).

Background

Plaintiff's decedent, Jennifer Pepitone (the "patient"), age 44, died at 9:09 PM on Saturday, April 10, 2021,[5] at nonparty NYU Langone Health System ("NYU Langone"). Her immediate cause of death (as listed in her Certificate of Death) was "massive pulmonary embolism" due to (or as a consequence of) pneumonia and COVID-19.[6] Her death was

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[4] Contrary to the contention of Park Avenue's counsel, plaintiff, while specifically opposing dismissal of his medical malpractice claim, did not abandon his ancillary claims for negligence, wrongful death, and loss of services. *Accord Mandel v. New York County Pub Admr*, 29 A.D.3d 869, 815 N.Y.S.2d 275 (2d Dept. 2006) ("a cause of action to recover damages for wrongful death does not encompass a derivative cause of action by the decedent's spouse for loss of services during the period prior to the decedent's death").

[5] All references are to calendar year 2021, unless otherwise indicated.

[6] The patient's Certificate of Death, dated April 12, 2021. The defense expert for Park Avenue, Lawrence Diamond, M.D. ("Dr. Diamond"), incorrectly stated that the patient died from (or due to) "natural causes," and that her "cause of [her] death was natural causes." Park Avenue's defense counsel adopted Dr. Diamond's incorrect statements in that regard. The "immediate cause" of death and the "manner of death" are two separate, non-overlapping terms. Dr. Diamond (and, by extension, Park Avenue's defense counsel) impermissibly blurred "the [crucial] distinction between the '[immediate] cause of death' and 'manner of death.'" *People v. Davis*, 28 N.Y.3d 294, 44 N.Y.S.3d 358 (2016). While the "immediate cause" of the patient's death was listed in her death certificate as "massive pulmonary embolism," the "manner of [her] death" was listed therein as "natural (footnote continued)

preceded by the ultrasonographic findings at 11:01 AM of that day of: (1) "Left deep vein thrombosis extending from the distal left femoral vein to the posterior tibial and peroneal veins"; and (2) "Right peroneal vein deep vein thrombosis."[7]

Approximately 24 hours earlier at 10:39 PM on Friday, April 9th, the patient was admitted to NYU Langone in critical condition.[8] Her D-Dimer (a blood-test indicator of recent or current clot formation and lysis), reported at 12:10 AM on Saturday, April 10th, was elevated at 4,530, which was nine times the normal range of less than 500 nanograms per milliliter.[9] The brief course of her terminal hospitalization was summarized in the discharge summary, as follows:

> "[The patient's] presenting medical history [at admission included] scleroderma[10], interstitial lung disease[/]pulmonary fibrosis[11], heart failure

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cause." Next, the defense expert for Dr. Khanina and MMS, Edward Eden, M.D. ("Dr. Eden"), mischaracterized the contents of the patient's death certificate. Dr. Eden's statement that "[a]s per the [patient's] death certificate, other significant contributing conditions of [her] death included scleroderma and pulmonary fibrosis," was factually unsupported. According to the patient's death certificate, the "immediate cause" of the patient's death was "massive pulmonary embolism" due to (or as a consequence of) pneumonia and COVID-19.

[7] NYU Langone's records, page 966/001264. NYU Langone's records are referenced by their page number followed by their corresponding Bates-stamp number after the forward slash ("/"). When quoting from the hospital and other medical records, the Court spelled out abbreviations and corrected typographical (as well as capitalization) errors.

[8] NYU Langone's records, page 859/001157.

[9] NYU Langone's records, page 563/001250.

[10] "Scleroderma" is the "[t]hickening and induration of the skin caused by new collagen formation, with atrophy of pilosebaceous follicles; either a manifestation of progressive systemic sclerosis or localized (morphea)." Stedman's Medical Dictionary (online edition available on WESTLAW) ("Stedman's"), Entry No. 802000. The patient's scleroderma was of the systemic type (footnote by the Court).

[11] "Interstitial pulmonary fibrosis" is defined to include "pulmonary fibrosis associated with connective tissue disease and other known primary diseases." Stedman's, Entry No. 332220. "Fibrosis" is the "[f]ormation of fibrous tissue as a reparative or reactive process, as opposed to formation of fibrous tissue as a normal constituent of an organ or tissue." Stedman's, Entry No. 332130 (footnote by the Court).

with reduced ejection fraction [of] 35%[12], Raynaud's[13], chronic pericardial effusion[14], osteomyelitis[15] of left foot[.] status post-intravenous antibiotics[.]

[She] presented to the [NYU Langone] emergency department in acute respiratory failure requiring emergent intubation. [The] patient had been [previously] discharged to rehab [Park Avenue] where she contract[ed] COVID. She initially had mild symptoms and eventually went home [from Park Avenue on April 2nd]. While at home her shortness of breath worsened. Yesterday [April 9th], she could not move without being short of breath, so she came to the emergency department.

In the emergency department, *[the] patient [was] found to be in acute respiratory distress* and not responding appropriately. *She was severely hypotensive*. [The] patient [was] emergently intubated. [A] central line [was] placed. *[The] patient [was] started on Levophed and then Vasopressin* [both are vasoconstrictor agents administered to increase blood pressure]. Pulse oximetry readings [were] found to be low (likely due to scleroderma)[;] however[, they] were much improved on arterial blood gas [readings]. [The] patient [was] sent for *CT [pulmonary embolism] study* which *revealed partially occlusive [pulmonary embolism]* in [the] left main pulmonary artery[16] with moderate heart strain. Bedside echocardiogram performed by [a] cardiology fellow . . . revealed right ventricular abnormalities. After placement of [a] femoral arterial line, accurate blood-pressure readings enabled lowering of Levophed and discontinuing Vasopressin.

[The] patient's condition worsened in the intensive care unit. [Her] pressor requirements went up. [A] tissue plasminogen activator [was] given. *[The] patient [was] in multi-organ failure*. [She had an] acute kidney injury [that was] worsening with hyperkalemia. *After further discussions with [the patient's]*

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[12] "Ejection fraction" is "the fraction of the blood contained in the ventricle at the end of diastole that is expelled during its contraction, *i.e.*, the stroke volume divided by end-diastolic volume, normally 0.55 [or 55%] . . . or greater. . . ." Stedman's, Entry No. 352700 (footnote by the Court).

[13] "Raynaud Syndrome" (also known as "Raynaud phenomenon") is the "idiopathic paroxysmal bilateral cyanosis of the digits due to arterial and arteriolar contraction; caused by cold or emotion." Stedman's, Entry No. 887600 (footnote by the Court).

[14] "Pericardial effusion" is the "increased fluid within the pericardial sac; [it] can cause circulatory compromise by compression of the heart; [it is] most often caused by inflammation, infection, malignancy, and uremia." Stedman's, Entry No. 280830 (footnote by the Court).

[15] "Osteomyelitis" is the "[i]nflammation of the bone marrow and adjacent bone." Stedman's, Entry No. 638160 (footnote by the Court).

[16] "Left pulmonary artery" is "the shorter of the two terminal branches of the pulmonary trunk, it pierces the pericardium to enter the hilum of the left lung." Stedman's, Entry No. 72310. "Hilum of lung" includes "a wedge-shaped depression on the mediastinal surface of each lung, where the bronchus, blood vessels, nerves, and lymphatics enter or leave the viscus." Stedman's, Entry No. 410160 (footnote by the Court).

husband (surrogate), decision [was] made to withdraw care. [The] patient expired."[17]

A brief review of the sequence of events preceding the patient's demise is necessary to determine whether triable issues of fact exist as to the potential liability of each defendant or each group of defendants.

The Patient's Stay at Park Avenue (February 20th to April 2nd)

On April 2nd (or seven days before her terminal hospitalization at NYU Langone on April 9th), the patient was discharged home from Park Avenue. During her stay at Park Avenue, the patient was diagnosed with COVID-19 on March 18th[18] and was placed "on isolation with droplet and contact precautions in place"[19] for a period of 14 days.[20] On March 19th, the patient's attending physician during her stay at Park Avenue, defendant Dr. Khanina, prescribed her one dose of Bamlanivimab (monoclonal antibody) for COVID-19, which she received on March 20th by way of a one-time, eight-hour-long intravenous drip.[21]

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[17] NYU Langone's records, page 861/001159 (emphasis and paragraphing added).

[18] Park Avenue's records, page 26 of 41 (Dr. Khanina's note that was started on March 19th at 4:21 PM and entered on March 21st at 10:46 PM). Because Park Avenue's records employ multiple types of pagination, the Court relies on the "Page [X] of [Y]" type of pagination, rather than on the alternative "Med Rec. P [Bates-stamp number] type of pagination.

[19] Park Avenue's records, pages 44 and 78 of 98.

[20] The patient was not vaccinated against COVID-19. Plaintiff's deposition transcript, page 92, lines 11-14; page 93, lines 4-7.

[21] Park Avenue's records, page 26 of 41 (Dr. Khanina's note that was started on March 19th at 4:21 PM and was entered on March 21st at 10:46 PM); Specialty Rx's records, page 000032.

For the remainder of her stay at Park Avenue, the patient remained COVID-19 positive (but largely asymptomatic).[22]

On March 20th at 3:57 PM, Dr. Khanina ordered prescription-only anticoagulant, known as Lovenox,[23] which is injected subcutaneously by way of a single-use prefilled syringe (the "Lovenox").[24] The underlying diagnosis for Dr. Khanina's Lovenox prescription was "U07.1-COVID-19,"[25] meaning that the patient was prescribed the Lovenox because she was positive for COVID-19.[26] The Lovenox prescription was further supported by the patient's elevated D-Dimer at 900 nanograms per milliliter (normal range below 500 nanograms per milliliter), which was drawn (and reported) the day prior on March 19th.[27] As noted above, the patient's D-Dimer on her termination admission to NYU Langone less than one month later on

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[22] Dr. Khanina's deposition transcript, page 63, lines 11-13 ("Positive for COVID doesn't mean [that a] patient has symptoms. [A patient] can stay positive for [the] next three months."); Plaintiff's deposition transcript, page 95, lines 4-6 ("because of the antibody drip[, the patient] would remain testing positive for up to 90 days").

[23] Approved by the Federal Drug Administration in March 1993, "Lovenox is a widely prescribed anticoagulant used to prevent or treat [among other medical conditions] thromboembolic disease and deep vein thrombosis." *Sanofi-Aventis U.S. LLC v. Food & Drug Admin.*, 733 F. Supp. 2d 162 (D.D.C. 2010). A generic form of Lovenox, named "Enoxaparin," was subsequently approved by the Federal Drug Administration in July 2010. Although the patient was prescribed (and dispensed) at Park Avenue, the generic form of Lovenox, the term "Lovenox," as used in this Decision and Order, encompasses Enoxaparin because both forms possess substantially the same overall pharmacodynamics profile. See *Sanofi-Aventis U.S. LLC v. Food & Drug Admin.*, 842 F. Supp. 2d 195 (D.D.C. 2012).

[24] Park Avenue's records, page 16 of 25 (Physician's Orders).

[25] Park Avenue's records, page 16 of 25 (Physician's Orders, referencing the ICD code).

[26] Park Avenue's records, page 41 of 41 (Dr. Khanina's note that was started on March 31st at 1:53 PM and that was entered on April 5th at 4:48 PM, stating "Lovenox, for COVID"). Dr. Khanina explained (at page 64, lines 19-21 and at page 65, lines 9-12 of her deposition) her rationale for prescribing Lovenox to the patient, as follows: (1) "[t]here are some complications where you can get some clots due to COVID[,] [d]epend[ing] on the severity of the COVID infection"; and (2) at Park Avenue, "[the] patient was still confined her room and not walking around[,] and she was and high risk of developing clots because of [the] isolation protocol at [Park Avenue]."

[27] Park Avenue's records, page 3 of 3 (laboratory results of March 19th). Park Avenue's expert, Dr. Diamond conceded that the "elevated D-Dimer elevated levels may indicate blood clots."

April 9th was 4,530, which was nine times the normal range of less than 500 nanograms per milliliter.

The Lovenox injections were performed at the frequency of twice per day, once at 9 AM, and the other at 9 PM of the same day, for a period of two weeks.[28] The start date for the Lovenox injections was set for March 22nd at 10:04 AM.[29] Later the same day of March 22nd at 9 PM, the patient received her first Lovenox injection.[30] She continued receiving the Lovenox injections twice per day (with a few exceptions not relevant here) through and including 9 AM on April 2nd,[31] which was several hours before her discharge home from Park Avenue in the early afternoon of that day.

On March 31st, Dr. Khanina renewed the patient's prescription for Lovenox injections for another two weeks. The principal diagnosis underlying the prescription renewal was "Z86.16-Personal history of COVID-19."[32] The renewal of the patient's prescription for Lovenox was in anticipation that she would stay at Park Avenue on and after 9 AM of April 2nd because the initial, 14-day term of her original prescription for Lovenox (counting from

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[28] The patient previously received Lovenox during her hospitalization for osteomyelitis at NYU Langone from February 10th to February 20th, which immediately preceded her stay at Park Avenue. In the course of her prior hospitalization at NYU Langone, she had no ultrasonographic evidence of deep vein thrombosis. NYU Langone's records, page 190/000488.

[29] Park Avenue's records, page 24 of 25 (Physician's Orders, specifying the start date and time for the Lovenox injections). Dr. Khanina did not know why the start of the Lovenox was delayed by two days from March 20th to March 22nd, even though she counted the days of the injections from the date of her March 20th order (rather than from the date of the March 22nd order). Dr. Khanina's deposition transcript, page 54, lines 10-14; page 56, lines 23-24.

[30] Dr. Khanina's note that was started on March 22nd at 4:18 PM and was entered on March 28th at 8:52 PM, stating that the patient "is on Lovenox from 3/20" is incorrect. Park Avenue's records, page 29 of 41.

[31] Park Avenue's records, pages 2 and 1 of 17 (Resident Medication Administration Record for March 2021); page 1 of 9 (Resident Medication Administration Record for April 2021).

[32] Park Avenue's records, page 25 of 25 (Physician's Orders).

Dr. Khanina's March 20th order) would have expired at 9 AM on April 2nd.[33] Dr. Khanina wanted the patient to remain on Lovenox throughout her stay at Park Avenue, but did not want her to receive Lovenox outside Park Avenue.[34] Although Dr. Khanina and the Park Avenue staff urged the patient to stay because she remained COVID-19 positive, she wanted to go home on Good Friday, April 2nd, to be with her family on Easter Sunday, April 4th.[35] Contrary to the contention of Dr. Khanina's expert,[36] the patient did not leave Park Avenue against medical advice but, rather, was discharged home or (in Park Avenue's descriptive terms) to the "community."[37]

Dr. Khanina's opinion that Lovenox was *not* indicated for the patient once she was discharged from Park Avenue, and that she was *not* to receive Lovenox post-discharge,[38] was not communicated either to the patient, plaintiff, or any medical provider in the Huntington Medical Group. In connection with the patient's discharge from Park Avenue on April 2nd,

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[33] Dr. Khanina's deposition transcript, page 56, line 19 to page 57, line 11.

[34] Dr. Khanina's deposition transcript, page 59, line 20 to page 60, line 18; page 76, line 21 to page 77, line 4.

[35] The patient initially was supposed to be discharged on March 22nd but, because of the intervening positive COVID-19 test, her discharge was postponed. Park Avenue's records, page 76 of 98 (Care Plan Activity Report).

[36] Dr. Eden, the defense expert for Dr. Khanina and MMS, incorrectly stated that: (1) "the patient checked herself out against medical advice"; (2) the patient was "discharged against the advice of Dr. Khanina and the staff at Park Avenue"; and (3) "plaintiff made the decision to have the patient discharged against medical advice."

[37] Park Avenue's records, page 1 of 4 (Discharge Summary that was created on March 9th and was completed on April 2nd, characterizing the patient's "discharge disposition" as being to the "community"). Although the discharge disposition offered "Left Against Advice" box as one of the options for a patient's disposition, the box under that heading was not checked. In addition, the social worker's discharge notes corroborated that Dr. Khanina was aware of (and did not object to) the patient's home discharge. Park Avenue's records, page 1 of 4 (Social Services) ("[The patient] was *encouraged* to stay here at the facility as [she] remains COIVD-19 positive. [The patient] and [her] family *declined* and will be discharging home [April 2nd]. As per rehab, [the patient] is functionally stable for discharge. *MD [Dr. Khanina] made aware and [the patient] is being discharged home stable*. . . .") (emphasis added).

[38] Dr. Khanina's deposition transcript, page 61, line 13 to page 62, line 10; page 65, lines 4-6; page 68, lines 4-10.

neither Dr. Khanina nor anyone else from the Park Avenue staff informed the patient, her husband, or any medical provider in the Huntington Medical Group that the patient was no longer on the Lovenox, or, conversely, whether she should continue receiving it post-discharge. The discharge instructions (which were assembled in a binder for the patient's use) were silent in that regard.[39] Although Park Avenue listed in its discharge instructions numerous medications which the patient was supposed to *take* post-discharge, it failed to state which medications, such as Lovenox, she was to *stop* post-discharge.[40]

The lack of clarity over whether the patient should (or should not) take Lovenox post-discharge was further compounded by the Park Avenue staff's hand-off to the patient at discharge[41] of the manufacturer's box containing ten prefilled, ready-to-use, single-dose Lovenox syringes (plus two loose prefilled, ready-to-use, single-dose Lovenox syringes in a separate bag).[42] A photograph of the manufacturer's box containing a total of ten take-home syringes, with Park Avenue's prescription label affixed to the manufacturer's box, was part of the record before the Court.[43]

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[39] Dr. Khanina conceded that: (1) she neither reviewed nor signed the patient's discharge summary, including its section for discharge medications; and (2) she did not hand either prescription slips or actual medications to the patient at discharge.

[40] Park Avenue's records, pages 3-4 of 4 (Discharge Medications).

[41] According to plaintiff's deposition testimony, a Park Avenue nurse handed to the patient at discharge a shopping bag filled with Lovenox and other medications, and that "[the patient] was surprised to see the medication [i.e., Lovenox] in the [shopping] bag when she came home [from Park Avenue]." Nothing in Park Avenue's records, however, indicated whether or not the patient was given Lovenox syringes at discharge.

[42] Plaintiff testified during his deposition that "[t]here were two loose [prefilled, ready-to-use syringes] in the bag [of medications handed off to the patient at discharge] in addition to the [manufacturer's] box." Plaintiff further testified that the patient received a total of 12 prefilled, ready-to-use syringes at discharge from Park Avenue: ten syringes in the manufacturer's box and two "loose" (or non-boxed) prefilled, ready-to-use syringes.

[43] A photograph of the manufacturer's box with Park Avenue's prescription label affixed to it (as authenticated by plaintiff) was included as exhibits to plaintiff's oppositions to defendants' motions.

Park Avenue's prescription label (as was affixed to the manufacturer's box) undisputedly referred to the patient by first and last name, and instructed that she should receive Lovenox subcutaneously every 12 hours.[44] Park Avenue's prescription label (as was affixed to the manufacturer's box): (1) listed Park Avenue's name and address; (2) specified the patient's first and last name; (3) referred by name to Dr. Khanina as the Lovenox prescriber; and (4) referred by name to a particular pharmacist as the Lovenox dispenser. Further, Park Avenue's prescription label (as was affixed to the manufacturer's box) stated, "Refill on 04/04/2021," "NEW ORDER" (in all caps). The manufacturer's instructions printed on the outside the box stated that Lovenox could be self-administered by a patient and, for that purpose, listed the specific steps that a patient needed to perform for its successful self-administration.[45]

According to plaintiff,[46] although Dr. Khanina told him that "[the patient] was going home with a whole host of medications," she did not review the Lovenox or any of the other take-home medications either with him or the patient.[47] Plaintiff did not ask Dr. Khanina any questions. Plaintiff further testified that "nobody [either Dr. Khanina or anyone from the Park

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[44] Plaintiff's EBT transcript, page 117, lines 4-6 (testifying that "the sticker [was] on the outside . . . the box").

[45] Dr. Khanina's deposition testimony that she "didn't *prescribe* [the patient] any Lovenox to go home with," was effectively nullified by the Park Avenue staff's hand-off of the unused Lovenox syringes to the patient at discharge. In that regard, Dr. Khanina conceded that "[i]t is a fact that [the patient] was given Lovenox without a prescription" at discharge.

[46] Plaintiff's deposition transcript, page 95, lines 17-22; page 104, line 19 to page 105, line 6; page 208, line 3 to page 209, line 11.

[47] Although Dr. Khanina in her deposition testimony denied having any conversation at discharge either with plaintiff or the patient about the post-discharge medications, plaintiff's deposition testimony to the contrary must be accepted as true and given the benefit of every reasonable inference that may have been drawn therefrom. *See Demshick v. Community Hous. Mgt. Corp.*, 34 A.D.3d 518, 824 N.Y.S.2d 166 (2d Dept. 2006); *see also De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 27 N.Y.S.3d 468 (2016) (the account of events, by plaintiff as non-movant, "must be credited on a summary judgment motion").

Avenue staff] instructed [the patient] to take [the Lovenox]. There is no possible way she would have been able to administer that to herself."[48] Following her discharge from Park Avenue in the early afternoon of Friday, April 2nd, the patient did not receive Lovenox on Friday night, April 2nd, nor did she receive it either on Saturday, April 3rd, or Sunday, April 4th.[49] At discharge, the patient was instructed to set up her own virtual appointments with her primary care physician, Dr. Baltus, and her treating pulmonologist, Dr. Mankikar.[50]

The Patient's Home Healthcare with Revival (April 5th through April 9th)

On Monday, April 5th, the patient started her home-based physical therapy and wound care with Revival. In the early afternoon of that day, Nurse Jeffers, a "field clinician" with Revival,[51] visited the patient at home for the start of care, reviewed her discharge medications from Park Avenue, and performed wound care to her feet.[52] According to plaintiff who was at home at the time: (1) the patient showed Nurse Jeffers the box of the take-home Lovenox syringes; (2) the patient specifically asked Nurse Jeffers whether she (the patient) should be receiving Lovenox; and (3) Nurse Jeffers responded in the negative, as more fully set forth in the margin.[53] Conversely, Nurse Jeffers flatly denied in her deposition testimony being shown

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[48] Plaintiff's deposition transcript, page 119, lines 19-21; page 219, lines 19-22.

[49] Plaintiff's deposition transcript, page 120, lines 12-23; page 124, lines 7-9.

[50] Park Avenue's records, page 3 of 4 (Progress Note, Nursing, dated April 2nd and timed at 9:49 AM).

[51] Revival's deposition transcript (by Olivia Deutsch, Family Nurse Practitioner), page 14, line 6 (describing Nurse Jeffers as a "field clinician").

[52] At her visit to the patient, Nurse Jeffers prepared the patient's "OASIS" form, which stands for "Outcome and Assessment Information Set." Another nurse at Revival finalized the patient's OASIS form. Revival's deposition transcript, page 17, line 20 to page 18, line 11.

[53] Plaintiff's deposition transcript, page 175, lines 6-15 ("We questioned the [Lovenox] self-injectors[,] and [Nurse Jeffers] was immediately given the [discharge] binder [from Park Avenue] to review with her. That was the first step of their interaction, here is the care plan. I overheard [the patient say to Nurse Jeffers that Park Avenue] . . . sent her home with these [Lovenox] injectors, she didn't know what to do with them. Shortly after (footnote continued)

anything, or being asked anything, or discussing anything, about Lovenox, as more fully set forth in the margin.[54]

During her initial visit, Nurse Jeffers filled out a Home Health Certification and Plan of Care for the patient, to be approved by the patient's primary care physician, Dr. Baltus (the "plan of care"). Nurse Jeffers indicated in the plan of care that the patient was *not* prescribed any injectable medications, solely on the basis of the list of medications in Park Avenue's discharge papers and without consulting with either the patient's discharging physician Dr. Khanina at Park Avenue, patient's primary care physician Dr. Baltus, or any other physician at Huntington Medical Group.[55]

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that[,] [the] answer was no, [Nurse Jeffers] was not supposed to be giving them to her. I am assuming they were not in [Park Avenue's] care plan."); page 176, lines 22-24 ("I heard [the patient] ask [Nurse Jeffers] about the [Lovenox] injections and the reply was they would look through [Park Avenue's] care plan book[,] and they did.").

In addition, the patient's mother, nonparty Maryann Hughes, testified that her daughter relayed to her a conversation with a Revival nurse to the effect that "the [Revival] nurse told [the patient] that she didn't have to use the Lovenox when [the patient] asked [the nurse] about it." The hearsay nature of the patient's mother's deposition testimony does not preclude its admissibility at this stage of litigation because "hearsay may be considered on a motion for summary judgment so long as the hearsay evidence is not the only evidence submitted to raise a triable issue of fact." *Gardell v. Arden Ave. Homeowners Assn.*, 228 A.D.3d 834, 214 N.Y.S.3d 64 (2d Dept. 2024).

[54] Nurse Jeffers's deposition transcript, page 21, lines 15-16 ("[Nurse Jeffers and the patient] went over the list of medications on her discharge paperwork [from Park Avenue]); page 23, lines 12-14 (denying "any conversation [with the patient or plaintiff] about medications that were blood thinners"); page 24, lines 8-15 (denying that the patient or plaintiff showed her "any types of medicines that they had come home with [from Revival]" or "any type of an injector for any kind of medication"); page 36, lines 6-12 (testifying that she had never see[n] any boxes or any type of Lovenox injectors while she was treating the patient nor that she had any conversations with plaintiff or the patient about injectable Lovenox); page 46, lines 7-13 (testifying that the patient and plaintiff showed her treatment supplies for the patient's feet, but did not show her anything else); page 54, lines 11-20 (testifying, by way of a hypothetical, that if she had been asked the Lovenox or if she had been shown the take-home syringes, she "would have [had to] call someone and verify if [a patient] need[ed] to be taking that right now or not[,] because the fact that [such patient had] the medication and the orders [were] not reflecting that [such patient] need[ed] to be taking the medication [was not] consistent and that [was] not good"); page 55, lines 5-12 (testifying, by way of another hypothetical, that if she had been shown a medication that a patient did not know whether he or she should be taking or not, and such medication was not on the medication-discharge list, she "would have similarly called the provider and asked about it").

[55] Nurse Jeffers's deposition transcript, page 39, lines 9-18.

For the remainder of the week (including the morning of Friday, April 9th), Revival continued providing physical therapy and wound care to the patient at home. The question of whether the patient should (or should not) have been receiving Lovenox never came up again in her (or her husband's) interactions with anyone from Revival, including in the course of Nurse Jeffers's follow-up visit with the patient on Thursday, April 8th. The patient did not receive Lovenox for the remainder of that week.

On April 8th, Dr. Baltus's office verbally approved Revival's plan of care for the patient.[56] Dr. Baltus did not meet (or have any contact) with the patient (either virtually or in person) after her discharge from Park Avenue or at any time in calendar year 2021.[57] Dr. Baltus first learned of the patient's death from clicking in her email in-box on the patient's blood culture results, which (by linking the patient's hospital chart at NYU Langone with Dr. Baltus's office computer system) indicated that she passed away.[58]

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[56] Revival's records, pages 000086 through 000090 (Home Health Certification and Plan of Care, dated April 5th, verbally approved on April 8th, and allegedly endorsed in writing by Dr. Baltus on May 19th). *But see* Huntington Medical Group's records, pages 000540-000548 (NYSCEF Doc No. 138) reflecting that Revival faxed its plan of care to Dr. Baltus on May 20th, and that Dr. Baltus allegedly manually signed and returned its signed copy by fax to Revival on May 21st). The significance, if any, of Revival's alleged predating (by two days) of Dr. Baltus's written approval of its plan of care would be for the jury to assess. *See Scarpulla v. Williams*, 147 A.D.3d 1101, 46 N.Y.S.3d 914 (2d Dept. 2017) ("It is for the jury to make determinations as to the credibility of the witnesses. . . .").

[57] The patient's last visit with Dr. Baltus was on August 14, 2020, and her last communication with Dr. Baltus (by email) was on January 23, 2021. Huntington Medical Group's records, pages 000303-000304, 001031-001035, and 000125.

[58] Dr. Baltus's deposition transcript, page 27, line 18 to page 28, line 7. After reviewing the patient's chart, Dr. Baltus informed Dr. Mankikar of the patient's death. Dr. Baltus's deposition transcript, page 28, lines 17-19; page 31, line 14 to page 32, line 11.

. . The Patient's Telehealth Visit with Dr. Mankikar
on April 6th and Her Telephone Call to His Office on April 9th

On Monday, April 5th, the patient telephoned the office of her treating pulmonologist Dr. Mankikar at Huntington Medical Group with the complaints of "having [an] on and off shortness of breath and fevers." Nonparty Licensed Practice Nurse Gina Todaro ("Nurse Todaro") advised the patient to set up a virtual appointment with Dr. Mankikar.[59] A telehealth visit was a standard operating procedure at the time because of the patient's COVID-19 positive status and the ongoing pandemic.

On Tuesday, April 6th, the patient had a virtual telehealth visit with Dr. Mankikar. During her telehealth visit, the patient did not ask – and Dr. Mankikar did not know – about the box of Lovenox syringes in her possession. At the April 6th visit, Dr. Mankikar did not suspect that the patient was then suffering from pulmonary embolism or its precursor, deep vein thrombosis, as corroborated by his contemporaneous notes, which stated that, at the time, he prescribed the patient bronchodilator Symbicort and continued her on her extant bronchodilator Spiriva, as follows:

> "44-year-old female, history of scleroderma[,] interstitial lung disease, on CellCept [an immunosuppressive drug,] presents for a follow up of dyspnea.
>
> She was open to being started on OFEV [a lung-disease medication,] . . . pending final authorization [from her insurance company].
>
> Continues to see Cardiology and Rheumatology.
>
> No recent interstitial lung disease flares but had COVID [on] March 18th [, while at Revival] and received monoclonal antibody therapy on March 20th.

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[59] Huntington Medical Group's records, page 000391 (Nurse Todaro's telephone encounter note, dated April 5th and timed at 12:59 PM).

She states that she had a fever of 100 after being 48 hours without an elevated temperature.

Her oxygenation at home and at the rehabilitation facility she was 96-100%.

Will start [on] Symbicort 2 puffs twice daily, continue outpatient Spiriva [that was] started at [the] rehabilitation facility.

Will order imaging if symptoms do not improve.

Return to office [in] 4 weeks."[60]

Three days later at 2:33 PM on Friday, April 9th, the patient telephoned Dr. Mankikar's office with the complaint that the bronchodilators of Symbicort and Spiriva [were] "not working for [her] chest congestion [which was] causing [her to have] trouble breathing [and experience] no appetite/fatigue," and that her "[c]oughing [did] not bring up phlegm."[61] Nurse Todaro, after relaying the patient's telephone complaint to Dr. Mankikar, called her back later that afternoon. In her return phone call at 4:04 PM, Nurse Todaro "advised [the patient to] use . . . [an] Aerobika airway clearance device as per Dr. Mankikar."[62] Within one hour, Nurse Todaro dropped off the Aerobika device at the patient's home.[63] Shortly after the patient used

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[60] Huntington Medical Group's records, page 000401 (emphasis, paragraphing, and the periods at the end of each sentence are added). The patient's "After Visit Summary" listed the following issues that were addressed at her telehealth visit with Dr. Mankikar: "scleroderma, . . . interstitial lung disease, oxygen desaturation, restrictive ventilatory defect, mild pulmonary hypertension, [and] history of COVID-19." Huntington Medical Group's records, pages 001197-001199 (initial capitalization omitted).

[61] Huntington Medical Group's records, page 000402 ("Message from Jori Cwalinski sent at 4/9/2021 2:23 PM" and "Telephone Encounter by Judith Ross at 4/9/2021 3:22 PM").

[62] Huntington Medical Group's records, page 000402 ("Telephone Encounter by Gina Todaro, LPN at 4/9/2021 4:04 PM").

[63] Plaintiff's deposition transcript, page 130, lines 4-8; Dr. Mankikar's deposition transcript, page 50, line 3 to page 51, line 17. As described by Dr. Mankikar, an "Aerobika" is "[a] positive oscillating handheld device that you blow into[,] and it creates a percussion on your chest. . . . And you can take a deep breath and blow into it. [I]t is easier to use than a vest for patients that have frequent airway conditions, like mucus plugs. . . . The Aerobika device itself does not have a medication. . . . Individually, it is not a medicine."

the Aerobika device at approximately 5 PM, "her [pulmonary] condition drastically declined."[64]

Later in the afternoon/early evening of Friday, April 9th, the patient, her husband, and her mother discussed whether she should be taken to an emergency room. Eventually, the patient's mother took her by car to NYU Langone, arriving there in evening of Friday, April 9th. As noted above, the patient passed away from massive pulmonary embolism the following day.

On February 14, 2022, plaintiff (as the administrator of the patient's estate) commenced this action to recover damages for, in essence, medical malpractice and wrongful death. After discovery was completed and a note of issue was filed, defendants (individually or in groups, as applicable) timely moved for summary judgment. On August 9, 2024, the Court took all four summary-judgment motions on submission and reserved decision.

Standard of Review

"It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Pullman v. Silverman*, 28 N.Y.3d 1060, 43 N.Y.S.3d 793 (2016) (internal quotation marks omitted). "Establishing entitlement to summary judgment as a matter of law requires the defendant to rebut with factual proof plaintiff's claim of malpractice." *Pullman v. Silverman*, 28 N.Y.3d 1060, 43 N.Y.S.3d 793 (internal quotation marks and alterations omitted).

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[64] Plaintiff's deposition transcript, page 130, lines 9-20.

"The essential elements of medical malpractice are (1) a deviation or departure from accepted medical practice, and (2) evidence that such departure was a proximate cause of injury." *Mendoza v. Maimonides Med. Ctr.*, 203 A.D.3d 715, 160 N.Y.S.3d 663 (2d Dept. 2022) (internal quotation marks omitted). "A hospital or medical practice may be held liable under the doctrine of respondeat superior for the malpractice of an employee." *Weber v. Sharma*, ___ A.D.3d ___, ___ N.Y.S.3d ___, 2024 N.Y. Slip Op. 06001 (2d Dept. 2024).

"A defendant moving for summary judgment . . . must demonstrate the absence of any material issues of fact with respect to at least one of the elements of a cause of action alleging medical malpractice: (1) whether the physician deviated or departed from accepted community standards of practice, or (2) that such a departure was a proximate cause of the plaintiff's injuries" and, where wrongful death is alleged, of wrongful death as well. *Rosenthal v. Alexander*, 180 A.D.3d 826, 118 N.Y.S.3d 658 (2d Dept. 2020) (internal citation omitted). "When a defendant in a medical malpractice action demonstrates the absence of any material issues of fact with respect to at least one of those elements, summary judgment dismissing the action should eventuate unless the plaintiff raises a triable issue of fact in opposition." *Schwartz v. Partridge*, 179 A.D.3d 963, 117 N.Y.S.3d 300 (2d Dept. 2020) (internal citations omitted). "A physician's [expert affirmation] in opposition to a motion for summary judgment must attest to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury." *Shahid v. New York City Health & Hosps. Corp.*, 47 A.D.3d 800, 850 N.Y.S.2d 519 (2d Dept. 2008). "General and conclusory allegations unsupported by competent evidence are insufficient to defeat a motion for summary judgment." *Id.*

Discussion

Here, each defendant or group of defendants (as applicable) established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against such defendant or group of defendants, through their respective physicians' affirmations (and, in the instance of Revival, its nursing affidavit), the deposition testimony, and the patient's medical/hospital records. The essence of the opinions was that the patient did not require (and, accordingly, was *not* prescribed) Lovenox after her discharge from Park Avenue, and that no act or omission on the part of any defendant or group of defendants caused or contributed to the patient's pulmonary embolism (and its precursor, deep vein thrombosis). *See Avgi v. Policha*, ___ A.D.3d ___, ___ N.Y.S.3d ___, 2024 N.Y. Slip Op. 05951 (2d Dept. 2024); *Daniels v. Pisarenko*, 222 A.D.3d 831, 199 N.Y.S.3d 693 (2d Dept. 2023), *lv. denied* 42 N.Y.3d 903, 218 N.Y.S.3d 570 (2024).

Plaintiff's Opposition to the Motions of Park Avenue, Dr. Khanina/MMS, and Nurse Jeffers/Revival

In opposition to the respective defendants' prima facie showing, plaintiff (by way of the undisputed record and his expert affirmations[65]) raised a triable issue of fact as to the *departure* element of his medical malpractice and related claims as against: (1) Park Avenue; (2) Dr. Khanina (and vicariously MMS); and (3) Nurse Jeffers (and vicariously Revival).

At a more granular level, the undisputed facts demonstrated that:

(1) the patient received at the time of her discharge from Park Avenue a manufacturer's box with prefilled, ready-to-use, single-dose Lovenox syringes, with Park Avenue's

[65] Plaintiff's expert affirmations, each dated June 25, 2024, as to Park Avenue and Dr. Khanina/MMS; and plaintiff's expert affirmation, dated July 2, 2024, as to Nurse Jeffers/Revival.

medication label bearing her name. Park Avenue's name, Dr. Khanina's name as the prescriber, and the pharmacist's name as the dispenser, together with the instructions (as printed on the manufacturer's box) explaining its use;

(2) the patient, at discharge, did not receive (or otherwise possess) a prescription for Lovenox that was a prescription-only medication;[66]

(3) the patient's discharge instructions from Park Avenue (including those incorporated from Dr. Khanina) did *not* inform the patient to *stop* receiving Lovenox; and

(4) the patient and her husband were *not* informed, one way or the other, at discharge by either Dr. Khanina and/or the Park Avenue staff whether she should (or should *not*) be receiving Lovenox at home.

A reasonable jury could conclude from the foregoing undisputed evidence that Dr. Khanina and the Park Avenue staff (individually or in combination) engendered much confusion in the patient and her husband as to whether she should be receiving Lovenox post-discharge. The undisputed fact that the patient was handed a full box of prefilled, ready-to-use, single-dose Lovenox syringes at her discharge from Park Avenue, suggested that she was to continue receiving Lovenox post-discharge.[67] At the same time, however, the unexplained silence about Lovenox in both the discharge instructions and the patient's (and her husband's)

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[66] Dr. Khanina's deposition testimony that "[i]t is a fact that [the patient] was given Lovenox [at discharge] *without a prescription*" (emphasis added) is worth repeating.

[67] Park Avenue's counsel's assertion (in ¶ 7 of his reply affirmation, dated June 30, 2024) that plaintiff's "expert is either being *obtuse* or can't understand that prescribed medication left at a nursing home by a discharged resident will be discarded unless the resident takes it home with them" (emphasis added), bordered on the ad hominem attack on plaintiff's expert and should be avoided.

conversations with Dr. Khanina and the Park Avenue staff, cast a cloud of doubt as to whether the patient was to continue Lovenox post-discharge.[68]

The initial confusion at Park Avenue on Friday, April 2nd, as to whether the patient should (or should not) be receiving Lovenox post-discharge extended to Nurse Jeffers at Revival who started caring for the patient on Monday, April 5th. Drawing all factual inferences in plaintiff s favor at this stage of litigation, the Court must credit plaintiff's deposition testimony (and that of the patient's mother) that the patient showed the Lovenox box to Nurse Jeffers and that the latter (without consulting Dr. Khanina, any other healthcare provider at Park Avenue, or any healthcare provider at Huntington Medical Group) instructed her *not* to take the Lovenox. Nurse Jeffers's deposition testimony to the contrary (*i.e.*, that she had no conversation with the patient whatsoever about Lovenox) presented issues of credibility, with conflicting inferences to be drawn regarding Nurse Jeffers's alleged role in the patient's decision-making (or lack thereof) about Lovenox.

In addition, plaintiff raised a triable issue of fact as to whether the aforementioned departures of the Park Avenue staff and Dr. Khanina in connection with the patient's discharge – as well as the alleged departures of Nurse Jeffers/Revival in connection with the patient's

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[68] The defense experts' proffered explanations for the patient's receipt of the Lovenox at discharge from Park Avenue were speculative and irrelevant. *See* Affirmation of Dr. Diamond (Park Avenue's expert), ¶ 40 ("the Lovenox injections could not be given to another resident, so the staff likely gave them to [the patient] at discharge with the rest of her medications rather than disposing of them"), and ¶ 53 ("The Park Avenue staff appropriately returned [the patient's] property to her on discharge, including her personal effects and unused medications. The manufacturer's box containing unused Lovenox belonged to [the patient] because she, or her insurance company, paid for it, and Park Avenue would not restock it or give it to another patient."). *See also* Affidavit of Nurse Dennis-Jenkins (Nurse Jeffers and Revival's expert), ¶ 29 ("the discharging nurse [at Park Avenue] observed [the Lovenox] in [the patient's] room and inadvertently packed it up with the rest of her medications [at discharge]"). Notably, the patient's discharge papers did *not* instruct her to dispose of the Lovenox.

post-discharge care – were (individually or in combination) a *proximate cause* of her pulmonary embolism (as preceded by her deep vein thrombosis) and her ensuing demise. "In a medical malpractice action, where causation is often a difficult issue, a plaintiff need do no more [in opposition to the defendant's motion for summary judgment] than offer sufficient evidence from which a reasonable person might conclude that it was more probable than not that the injury was caused by the defendant." *Neyman v. Doshi Diagnostic Imaging Servs., P.C.*, 153 A.D.3d 538, 59 N.Y.S.3d 456 (2d Dept. 2017) (internal quotation marks omitted). "As to causation, the plaintiff's evidence may be deemed legally sufficient even if its expert cannot quantify the extent to which the defendant's act or omission decreased the plaintiff's chance of a better outcome or increased his [or her] injury, as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the plaintiff's chance of a better outcome or increased his [or her] injury." *Starre v. Dean*, 229 A.D.3d 728, 215 N.Y.S.3d 490 (2d Dept. 2024) (internal quotation marks and emphasis omitted). "To raise a triable issue of fact, a plaintiff need not establish that, but for a defendant doctor's failure to [timely] diagnose, the patient would have been cured." *Neyman v Doshi Diagnostic Imaging Servs., P.C.*, 153 A.D.3d 538, 59 N.Y.S.3d 456. Here, plaintiff's expert's opinion that the aforementioned "departures . . . are the reasons why [the patient] developed a pulmonary embolism and died,"[69] was sufficient (although terse) to raise a triable issue of fact on the element of proximate cause.

[69] Plaintiff's expert affirmation, ¶ 55, as to Park Avenue/Dr. Khanina; plaintiff's expert affirmation, ¶ 61, as to Nurse Jeffers/Revival.

Further, Nurse Jeffers's undisputed failure to verify with any healthcare provider – be it Dr. Khanina, any other healthcare provider at Park Avenue, and/or any healthcare provider with the Huntington Medical Group – whether the patient should (or should not) continue Lovenox post-discharge, did not sever the causal connection between Park Avenue and Dr. Khanina's alleged negligence in connection with the patient's discharge and the patient's ensuing injuries/demise. Rather, "[w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, . . . liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence." *Turturro v. City of New York*, 28 N.Y.3d 469, 45 N.Y.S.3d 874 (2016) (internal quotation marks omitted). "As with determinations regarding proximate cause generally, because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, whether an intervening act is foreseeable or extraordinary under the circumstances generally is for the fact finder to resolve." *Turturro v. City of New York*, 28 N.Y.3d 469, 45 N.Y.S.3d 874 (internal quotation marks and alterations omitted). Because nothing in Park Avenue's discharge instructions indicated that the patient was to receive Lovenox post-discharge, it was reasonably foreseeable under the circumstances that the chain of proximate cause would not be severed by Nurse Jeffers's failure to obtain an outside consultation about the Lovenox.

Contrary to the defense expert's contentions,[70] it was irrelevant under the circumstances of this case *insofar as they related to Park Avenue, Dr. Khanina, and Nurse Jeffers/Revival*,

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[70] *See* Affirmation of Dr. Diamond (Park Avenue's expert), ¶ 50 ("there was no indication to provide Lovenox to the [patient] on an outpatient basis"); ¶ 50 ("In 2021, Lovenox was not indicated for anticoagulation of COVID-19 patients recovering at home."); ¶ 53 ("Lovenox was not indicated for outpatient use by the (footnote continued)

whether the patient medically needed or required Lovenox or another anticoagulant upon discharge from Park Avenue. Handing over the prescription-only Lovenox to the patient at discharge from Park Avenue without any explanation – without even a perfunctory note in the discharge instructions that Lovenox should be stopped post-discharge – was, *in and of itself*, a departure from the standard of care on the part of Dr. Khanina and Park Avenue. Likewise, Nurse Jeffers's subsequent instruction (when the patient showed her the Lovenox box on Monday, April 5th) that the patient should *not* receive Lovenox at home was a departure from the standard of care. The patient's ensuing demise five days later on Saturday, April 10th, from pulmonary embolism – preceded by the formation of deep vein thrombosis (which, as noted above, was discovered shortly after her terminal admission at NYU Langone) – raised a triable issue of fact as to the existence of a causative link to the cessation of Lovenox during the patient's at-home stay. It would be for the jury to decide whether, as Dr. Khanina's expert posited, "it [was] more likely than not that the [patient's] pulmonary embolus developed as a

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[patient]"). *See also* Affirmation of Dr. Eden (Dr. Khanina/MMS's expert), ¶ 15 ("the standard of care did not require continued Lovenox after the [patient's] discharge home from Park Avenue"); ¶ 15 ("there is no clinical evidence that the [patient] should have been sent home with Lovenox, as she was mobile, and the standard of care certainly did not require same"); ¶ 17 ("the standard of care did not require blood thinners, including Lovenox, upon [the patient's] discharge") (underlining in the original); ¶ 17 ("there are no clear guidelines [and even less so in March 2021 during the active pandemic] for administration of prophylactic blood thinners in a patient with COVID-19 who left an in[-]patient care facility, and there nevertheless was no indication for same"); ¶ 18 ("the [patient] was mobile upon discharge and therefore, did not have a particularly elevated risk of developed DVT/pulmonary embolism upon discharge"); ¶ 19 ("once a patient leaves the hospital and is active, the patient does not require routine anticoagulation unless the patient had a pulmonary embolism while in the hospital, which was not the case with this patient"). *See also* Affidavit of Nurse Dennis-Jenkins, ¶ 28 ("the National Institutes for Health COVID-19 treatment guidelines in effect as of April 2021, recommended against Lovenox in non-hospitalized adult patients"). Nurse Dennis-Jenkins's reference to pages 215-216 that were excerpted from the comprehensive COVID-19 treatment guidelines was unreliable and non-probative.

result of her underlying scleroderma, rather than the fact that she was no longer taking Lovenox after her discharge from Park Avenue."[71]

Defendants' "no harm, no foul argument" (*i.e.*, that Dr. Khanina would have said "no" to the Lovenox if she had been asked about it by the patient, her husband, and/or Nurse Jeffers[72]) missed the mark. Dr. Khanina's deposition testimony in that regard was hypothetical and improperly based on hindsight reasoning. *Accord Zawadzki v. Knight*, 76 N.Y.2d 898, 561 N.Y.S.2d 907 (1990); *Ortiz v. Wyckoff Hgts. Med. Ctr.*, 149 A.D.3d 1093, 53 N.Y.S.3d 189 (2d Dept. 2017).

Park Avenue's reliance on the Emergency or Disaster Treatment Protection Act (Public Health Law former article 30-D, §§ 3080-3082, repealed by L 2021, ch 96, § 1) ("EDTPA"), was insufficient, *on the basis of Park Avenue's submissions in support of its motion*, to justify the grant of summary judgment in its favor as a matter of law. Park Avenue's expert, Dr. Diamond, failed to address in his expert affirmation whether the manner of the patient's discharge from Park Avenue on April 2nd fit within the constraints of the amended definition of "health care services," as was set forth in Public Health Law former § 3081 (5), which was effective from August 3, 2020, and which was repealed on April 6, 2021.[73] Next, Dr. Khanina's contention that plaintiff's claims as against her (and, by extension, as against MMS) are barred by the EDTPA was improperly raised for the first time in reply to plaintiff's

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[71] *See* Affirmation of Dr. Eden (Dr. Khanina's expert), ¶ 32.

[72] Dr. Khanina's deposition transcript, page 68, lines 6-10 (testifying to her expectation that "[the patient] would [not] be on blood thinners after she left Park Avenue").

[73] Park Avenue's counsel's extensive (and mostly accurate) discussion of the applicability of the EDTPA was not a substitute for expert opinions that should have elicited from Dr. Diamond. Park Avenue pleaded the EDTPA as the 13th affirmative defense in its answer, dated May 23, 2022.

opposition and, accordingly, was not considered.[74] *See Wilder v. City of Long Beach*, 214 A.D.3d 1024, 187 N.Y.S.3d 252 (2d Dept. 2023); *Odekirk v. Bellmore-Merrick Cent. School Dist.*, 70 A.D.3d 910, 895 N.Y.S.2d 184 (2d Dept. 2010).[75]

Plaintiff's Opposition to the Motion of Huntington Defendants

"Although physicians owe a general duty of care to their patients, that duty may be limited to those medical functions undertaken by the physician and relied on by the patient." *Aaron v. Raber*, 188 A.D.3d 967, 136 N.Y.S.3d 114 (2d Dept. 2020) (internal quotation marks omitted). "The existence and scope of a physician's duty of care is a question of law to be determined by the court." *Elstein v. Hammer*, 192 A.D.3d 1075, 145 N.Y.S.3d 572 (2d Dept. 2021). Here, the record established that Dr. Baltus's duty was limited to that of a primary care physician and did not extend to the diagnosis and treatment of pulmonary diseases or COVID-19, and that Dr. Baltus had no contact with the patient at all in calendar year 2021. Plaintiff's expert failed to address Dr. Baltus's deposition testimony in that regard. Nor did plaintiff's expert address the contention of the Huntington defendants' expert Dr. Silberman, who opined that Dr. Baltus's principal role, as an HMO-plan gatekeeper, was to refer the patient to "follow up with numerous specialists in pulmonary medicine, cardiology, rheumatology, and podiatry, which [she] facilitated by making appropriate referral." In sum, plaintiff failed to adduce any evidence that Dr. Baltus assumed a duty of care to diagnose and treat the patient after she was discharged from Park Avenue on April 2nd. As stated above, Park

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[74] Dr. Khanina/MMS's reply memorandum of law, dated July 19, 2024, Point II. Dr. Khanina and MMS each pleaded the EDPTA as the 13th affirmative defense in their respective answers, dated April 1, 2022, and May 13, 2022.

[75] The Revival defendants did not raise the EDPTA in their moving papers, nor did they plead such an affirmative defense in their respective answers.

Avenue's discharge instructions reflected that the patient was to make her own virtual appointment with Dr. Baltus (among others), which appointment she never scheduled.

Further, plaintiff's expert failed to raise a triable issue of fact as to the departure and causation elements of his medical malpractice and related claims as against the patient's treating pulmonologist Dr. Mankikar. Plaintiff's expert ticked off a list of Dr. Mankikar's alleged departures from the standard of care; namely, his alleged failures to: (1) appreciate the risk of (and to provide any direction and/or treatment for) blood clots, deep vein thrombosis, and/or pulmonary embolism; (2) be aware of and/or appreciate the patient as having been on Lovenox during her stay at Park Avenue; and (3) conduct a proper telehealth visit with the patient on April 6th. According to plaintiff's expert, the aforementioned departures on the part of Dr. Mankikar "[were] the reasons why [the patient] developed a pulmonary embolism and died." In essence, plaintiff's expert alleged a faulty syllogism: because the patient died from pulmonary embolism (as preceded by deep vein thrombosis), it must have been Dr. Mankikar's fault (as well as that of Dr. Baltus) to fail to remotely prescribe her the Lovenox or any other anticoagulant from April 6th through April 9th. In so opining, plaintiff's expert disregarded the undisputed facts that: (1) Dr. Khanina was overseeing the administration of Lovenox to the patient until her discharge from Park Avenue in the afternoon of April 2nd; (2) the patient, at discharge from Park Avenue, was imparted conflicting instructions regarding the post-discharge use of Lovenox; (3) Nurse Jeffers allegedly advised the patient on April 5th *not* to take Lovenox; and (4) the patient never mentioned to Dr. Mankikar, in any of her communications with him or his office, that she had been receiving Lovenox for two weeks at Park Avenue and, more fundamentally, that she had a six-day supply of twelve prefilled, ready-to-use, single-use Lovenox syringes at home.

The Court reviewed the parties' remaining contentions and found them unavailing or moot in light of its determination.

Conclusion

Based on the foregoing, it is

ORDERED that Park Avenue's motion for summary judgment (in Seq. No. 5) is granted to the extent that the claims of lack of informed consent and violations of the Public Health Law are dismissed as against it, and that the demand for punitive damages as against it is stricken, and the remainder of its motion is denied, and it is further

ORDERED that the joint motion of Dr. Khanina and MMS for summary judgment (in Seq. No. 4) is granted to the extent that the claim of lack of informed consent is dismissed as against each of these defendants and that the demand of punitive damages as against them is stricken, and the remainder of their motion is denied, and it is further

ORDERED that the joint motion of the Revival defendants for summary judgment (in Seq. No. 3) is granted to the extent that the claim of lack of informed consent is dismissed as against each of these defendants and that the demand of punitive damages as against them is stricken, and the remainder of their motion is denied, and it is further

ORDERED that the joint motion of the Huntington defendants for summary judgment (in Seq. No. 6) is granted in its entirety, and the complaint is dismissed as against all Huntington defendants with prejudice and without costs and disbursements, and it is further

ORDERED that the clerk is directed to enter a judgment in favor of the Huntington defendants, and it is further

ORDERED that the action is severed and continued against the remaining defendants, and the caption is amended to read in its entirety as follows (including the corrections to the parties' names):

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FRANK PEPITONE, Individually and as Administrator of the Estate of JENNIFER PEPITONE,

Plaintiffs,

-against-

ALEISHA JEFFERS, R.N.,
POLINA KHANINA, M.D.,
GAMZEL NY, INC., d/b/a REVIVAL HOME HEALTH CARE,
PARK AVENUE EXTENDED CARE FACILITY,
and MULTIVIZ HEALTH SERVICES, P.C.,

Defendants.
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; and it is further

ORDERED that Park Avenue's counsel shall electronically serve a copy of this Decision and Order with notice of entry on the other parties' respective counsel and shall electronically file an affidavit of service thereof with the Kings County Clerk, and it is further

ORDERED that the parties are directed to appear remotely at the Alternative Dispute Resolution Conference on February 25, 2025, at 12PM.

This constitutes the Decision and Order of the Court.

ENTER,

Genine D. Edwards
J.S.C.